87-790

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GLENN JOHNSON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ of Certiorari to
The Court of Appeals of Kentucky

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTIONS PRESENTED FOR REVIEW

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SECURES TO ALL ACCUSED OF CRIMES IN STATE COURTS THE RIGHT TO PRESENT EVIDENCE AS TO STATUTORY MITIGATING FACTORS, AND DUE PROCESS OF LAW IS DENIED A CRIMINAL DEFENDANT WHERE THE EVIDENCE ADDUCED AT HIS TRIAL DEMONSTRATES THE ARGUABLE PRESENCE OF THE MITIGATING AND REDUCTIVE FACTOR OF EXTREME EMOTIONAL DISTURBANCE, BUT THE TRIAL COURT DENIES HIS PROPER REQUEST FOR AN INSTRUCTION AS TO THAT FACTOR.

II.

THE RIGHT TO DUE PROCESS OF LAW, GUARANTEED TO ALL PERSONS PROSECUTED BY THE STATES FOR CRIMINAL OFFENSES, PROTECTS THEM FROM MISCONDUCT OF THE PROSECUTOR WHICH DENIES THEM THE FUNDAMENTALLY FAIR HEARING TO WHICH THEY ARE ENTITLED.

III.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROTECTS ALL PERSONS FROM CONVICTION OF A CRIMINAL OFFENSE IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF EACH AND EVERY ELEMENT OF THE OFFENSE CHARGED, AND IN THE ABSENCE OF EVIDENCE SUFFICIENT TO PERSUADE A RATIONAL FACT-FINDER OF EACH SUCH ELEMENT TO THAT DEGREE, A CONVICTION IS BASED UPON INSUFFICIENT EVIDENCE, OFFENDS DUE PROCESS, AND MUST BE REVERSED.

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PETITION

GLENN JOHNSON, Petitioner herein, respectfully prays for an order granting a Writ of Certiorari to review the judgment of the Court of Appeals of Kentucky affirming his conviction and sentence for assault, second degree, and for being a persistent felony offender.

OPINIONS BELOW

The decision of the Court of Appeals of Kentucky affirming Glenn Johnson's convictions and sentence was rendered November 7, 1986, is unreported, and is appended hereto as Appendix A. The decision of the Supreme Court of Kentucky denying discretionary review was rendered September 15, 1987, is unreported, and is appended hereto as Appendix B.

JURISDICTION

This Petition is timely filed, within 60 days of the judgment below on September 15, 1987 denying Petitioner's timely filed motion for discretionary review, and is based upon 28 U.S.C. 1257(3), Petitioner asserting here, and in the courts below, violations of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statutes (KRS)

KRS 500.080. Definitions.

(15) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

KRS 508.020 Assault in the second degree.

(1) A person is guilty of assault in the second degree when:

(a) He intentionally causes serious physical injury to another person; . . . .

(2) Assault in the second degree is a Class C felony.

KRS 508.030 Assault in the fourth degree.

(1) A person is guilty of assault in the fourth degree when:

(a) He intentionally or wantonly causes physical injury to another person . . . .

(2) Assault in the fourth degree is a class A misdemeanor.

KRS 508.040 Assault under extreme emotional disturbance.

(1) In any prosecution under KRS 508.010, 508.020 or 508.030 in which intentionally causing physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.

(2) An assault committed under the influence of extreme emotional disturbance is:

(a) A Class D felony when it could constitute an assault in the first degree or an assault in the second degree if not committed under the influence of extreme emotional disturbance; or

(b) A Class B misdemeanor when it would constitute an assault in the fourth degree if not committed under the influence of an extreme emotional disturbance.

KRS 507.020 Criminal Homicide.

(1) A person is guilty of murder

(a) . . . except that in any prosecution a person shall not be guilty under this section if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

KRS 532.060 Sentence of imprisonment for felony.

(1) A sentence of imprisonment for a felony shall be an indeterminate sentence, the maximum of which shall be fixed within the limits provided by subsection (2), and subject to modification by the trial judge pursuant to KRS 532.070.

(2) The authorized maximum terms of imprisonment for felonies are:

. . . .

(c) For a Class C felony, not less than five years nor more than ten years.

(d) For a Class D felony, not less than one year nor more than five years.

KRS 532.090 Sentence of imprisonment for misdemeanor.

(1) A sentence of imprisonment for a misdemeanor shall be a definite term and shall be fixed within the following maximum limitations:

(a) For a Class A misdemeanor, the term shall not exceed twelve months; and

(b) For a Class B misdemeanor, the term shall not exceed ninety days.

STATEMENT OF FACTS

Glenn Johnson, Petitioner herein, was convicted by a jury of second degree assault in the Circuit Court for Campbell County, Kentucky. Sentenced to five years' imprisonment on the assault charge, he was sentenced to an additional ten years as a persistent felony offender. His appeal to the Court of Appeals of Kentucky was denied, and the Kentucky Supreme Court denied discretionary review.

Petitioner's conviction resulted from an altercation on the evening of October 9, 1984. Petitioner, in the company of three persons, arrived at the V.F.W. Hall in the city of Alexandria, Campbell County, Kentucky. As the four entered the hall, two of Petitioner's companions retired to the restrooms. Petitioner and Connie Chilelli proceeded to the bar, where the complainant, one Sam Baker, was seated. Baker apparently objected to Petitioner's appearance, and words were exchanged and an argument developed about whether Petitioner was dressed like "a faggot." A shoving and wrestling match ensued, and both men fell to the floor of the V.F.W. hall.

Evidence at trial indicated that Baker claimed to have suffered three broken ribs, the loss of four teeth, and 30-35 stitches were required to close the cuts on his face. No medical testimony was adduced as to the nature and extent of those injuries. Petitioner's moved for a directed verdict on second degree assault on the ground that the injuries proved were not "serious physical injuries" sufficient to support a conviction of that offense. The trial court denied the motion.

Petitioner requested the trial court to instruct the jury upon the mitigating factor of extreme emotional disturbance, which, if found by the jury, would lessen the degree of the offense. That request was denied.

During the trial, the prosecutor argumentatively attacked Petitioner's credibility, and during final arguments, the prosecutor exhorted the jury to convict because the jury was the

conscience of the community, and interrupted the defense argument, stating "This is blatant. This is ridiculous." Defense motions for mistrial because of the prosecutor's misconduct were denied.

Petitioner was convicted of second degree assault, as charged, and the jury's recommendation of five years' incarceration was followed by the trial court. A separate hearing ensued in which Petitioner was found to be a persistent felony offender, and ten years was added to his sentence. Execution of that sentence has been stayed throughout the appellate proceedings.

The Court of Appeals gave short shrift to Petitioner's arguments. The court held that there was sufficient evidence to permit instructions on both second degree assault (requiring serious physical injury) and fourth degree assault, requiring "only" physical injury, and that the injuries described by Baker did not, as a matter of law, prevent a finding of serious physical injury.

The appellate court held that the trial court properly denied Petitioner's request for an instruction on the mitigating and reductive factor of extreme emotional disturbance, because there was insufficient evidence in the record of extreme emotional disturbance.

Finally, the appellate court denied Petitioner's contention that the questions and remarks of the prosecutor violated his right to a fair trial, and found nothing which would unfairly prejudice Petitioner. It thereupon affirmed Petitioner's conviction and sentence. The Supreme Court of Kentucky denied discretionary review on September 15, 1987.

REASONS FOR GRANTING THE WRIT

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SECURES TO ALL ACCUSED OF CRIMES IN STATE COURTS THE RIGHT TO PRESENT EVIDENCE AS TO STATUTORY MITIGATING FACTORS, AND DUE PROCESS OF LAW IS DENIED A CRIMINAL DEFENDANT WHERE THE EVIDENCE ADDUCED AT HIS TRIAL DEMONSTRATES THE ARGUABLE PRESENCE OF THE MITIGATING AND REDUCTIVE FACTOR OF EXTREME EMOTIONAL DISTURBANCE, BUT THE TRIAL COURT DENIES HIS PROPER REQUEST FOR AN INSTRUCTION AS TO THAT FACTOR.

KRS 508.040 provides that an assault may be reduced in degree where there exists extreme emotional stress in the offender and a reasonable justification or excuse under the circumstances as the offender perceives them. Kentucky's courts have interpreted the statute as *requiring* the giving of an instruction where the presence of such factor is arguable, *Creamer* v. *Commonwealth*, 629 S.W.2d 324 (1982), *Engler* v. *Commonwealth*, 627 S.W.2d 582 (1982).

The court below, however, stated that the statute is a mitigation statute, not a defense. But Petitioner never asserted extreme emotional disturbance as a defense, but rather as a mitigating factor, as the law intended.

This Court has held that the Eighth Amendment requires consideration, in capital cases, of all relevant mitigating factors which might lessen the sentence ultimately received by an offender, *Lockett* v. *Ohio*, 438 U.S. 587 (1978), *Bell* v. *Ohio*, 438 U.S. 637 (1978). While *Lockett* and *Bell* are capital cases, the principle is the same: any person accused of crime, facing the possibility of loss of his liberty for a substantial period of time, is entitled by the due process clause of the Fourteenth Amendment to consideration of whatever rele-

vant mitigating factor is available to him under the facts of his case. And extreme emotional disturbance is relevant, if only because the Kentucky statutes make it so.

Here, there was considerable evidence that Baker, who had been drinking, precipitated a violent argument with Petitioner for no reason save for Baker's "cussedness." Petitioner was taunted with the word "faggot," an assault upon his manhood. Petitioner was in no condition to start a fight, as he had been released from the hospital only days before, having undergone treatment for kidney injuries.

It was, or should have been, for the jury to weigh the evidence as to the mitigating factor, not for the trial and appellate courts. Perhaps the jury would have concluded that the factor was not available; but Petitioner had the consitutional right to an instruction on this relevant mitigating factor demonstrated so amply by the evidence. Had the jury concluded that the factor was present, and had it considered only fourth degree assault as it should have (see the discussion of issue III *post.*), then the jury could have reduced the charge to a misdemeanor, and Petitioner would have at most a 90 day sentence, rather than the 10 year sentence actually imposed. KRS 508.040, 532,090.

Petitioner was denied due process by the trial court's refusal to permit the jury to consider the relevant mitigating factor of extreme emotional disturbance.

II.

THE RIGHT TO DUE PROCESS OF LAW, GUARANTEED TO ALL PERSONS PROSECUTED BY THE STATES FOR CRIMINAL OFFENSES, PROTECTS THEM FROM MISCONDUCT OF THE PROSECUTOR WHICH DENIES THEM THE FUNDAMENTALLY FAIR HEARING TO WHICH THEY ARE ENTITLED.

During the prosecutor's closing argument, he urged the jury to convict Petitioner because the jury is "the conscience of this community." During the defense argument, the prosecutor interjected (without making an objection) "This is blatant. This is ridiculous." Previously, during cross examination of Petitioner, the prosecutor accused Petitioner of lying because his testimony contradicted that of the police: "What was it the police said, that didn't happen. You deny every single thing." The prosecutor further suggested that Petitioner was lying because otherwise there would have been no prosecution: "I suppose that's why he's (Baker, presumably) here. Because he knows he started it."

A prosecutor has two obligations under the law. He is responsible for prosecuting the guilty; but he is also charged with the responsibility of seeing that justice is done to all parties, the accused as well as the state. While he is at liberty to strike hard blows, a prosecutor may not strike foul ones, *Berger* v. *United States*, 295 U.S. 78 (1935). Where a state prosecution is involved, the prosecutor's conduct is to be measured by whether that conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974).

The reference by the prosecutor to the jury's duty to convict as the conscience of the community is no different than the argument that the jury must convict to "do its job." With respect to the latter argument, this Court has held "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice," *United States* v. *Young*, 470 U.S. 1, 105 S.Ct. 1038, at 1048 (1985).

With respect to the prosecutor's vouching for the credibility of the police and the prosecuting witness' credibility (cleverly accomplished by attacking the Petitioner as a liar because his testimony contradicted the state's witnesses), the Court stated, in *Young*:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.
>
> 105 S.Ct. at 1048.

In *Young*, the Court was confronted with a situation where no defense objections had been raised to the improper prosecutorial misconduct, necessarily involving the application of the plain error rule. Here, proper objections are raised through the defense motion for mistrial, and the issue was decided on its merits by the Court of Appeals.

More importantly, the facts here reveal a very close case, and the prejudice inherent in the prosecutor's remarks is magnified by the refusal of the trial court to take from the jury the second degree assault charge (which was not met by the state's evidence), and the refusal to instruct upon the mitigating factor of extreme emotional disturbance. Thus, it cannot be said that the prosecutorial misconduct did not contribute to Petitioner's conviction, and it ought to be reversed, *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985).

III.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROTECTS ALL PERSONS FROM CONVICTION OF A CRIMINAL OFFENSE IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF EACH AND EVERY ELEMENT OF THE OFFENSE CHARGED, AND IN THE ABSENCE OF EVIDENCE SUFFICIENT TO PERSUADE A RATIONAL FACT-FINDER OF EACH SUCH ELEMENT TO THAT DEGREE, A CONVICTION IS BASED UPON INSUFFICIENT EVIDENCE, OFFENDS DUE PROCESS, AND MUST BE REVERSED.

In every criminal case each essential element of the crime charged must be proved by the prosecution beyond a reasonable doubt before the presumption of innocence is overcome and a lawful conviction may occur. These fundamental precepts are important and fundamental facets of the constitutional right to due process of law, secured to those charged with crimes in state courts by the Fourteenth Amendment to the Constitution of the United States, *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, *Taylor* v. *Kentucky* (1978), 436 U.S. 478, 98 S.Ct. 1930.

The federal constitutional standard to determine whether the prosecution has met its burden in any given case is whether any rational trier of the fact could find the presence of each essential element beyond a reasonable doubt, which proof exists when the trier of the fact possesses a "subjective state of near certitude" as to the existence of each element. *Jackson* v. *Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

Consequently, if any element of any offense is not established by such evidence, qualitatively and quantitatively, the conviction offends due process and must be reversed. The assertion that "the evidence in support of [a defendant's] state conviction cannot be fairly characterized as sufficient to have led a rational trier of the fact to find guilt beyond a

reasonable doubt has stated a federal constitutional claim," *Id.*, 443 U.S. at 321.

Petitioner was convicted of second degree assault. The state was required, to secure that conviction, to prove that Baker suffered "serious physical injury"; mere "physical injury" would suffice only to support a conviction of fourth degree assault, a much lesser offense, KRS 508.030.

"Serious physical injury" is defined in the Kentucky Revised Statutes, KRS 500.080 (15) as follows:

> (15) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

It is evident that the injuries described in the opinion below do not rise to the level of "serious physical injury" as contemplated by the statute. There was certainly no substantial risk of death; there was no evidence of a serious or prolonged disfigurement (the 30-35 stitch wound to the face is not described as to location, as to whether there were any scars etc.) and no medical testimony was adduced as to whether there was any permanence, indeed, whether plastic surgery could not remove any scarring, thus avoiding a serious or prolonged disfigurement. And evidence as to permanence, or *prolonged*, disfigurement could only be established by expert testimony. There was none.

There was no evidence to support a conclusion that there was a prolonged impairment of health, or a prolonged loss of impairment of the function of any bodily organ.

While Kentucky's courts have not to date held that "medical proof is an absolute requisite to prove serious physical injury, . . . [they have concluded] that Kentucky Revised Statute 500.080 (15) sets a fairly strict level of proof which must be met by sufficient evidence, medical and/or

nonmedical. . . ." *Prince* v. *Commonwealth*, 576 S.W.2d 244 (1978).

In *Luttrell* v. *Commonwealth*, 554 S.W.2d 75 (1977), the Court found that a police officer, shot point-blank with a .38 calibre revolver, resulting in his being hospitalized for five days, and who was thereby unable to work for six weeks, was "not seriously injured in the statutory sense." One wonders what kind of "sense" was involved in the decision below; certainly a sense of justice and equal application of the laws was sorely lacking. If the officer in *Luttrell* was not seriously injured, then certainly Baker cannot be held in this case to have been so injured.

Consequently, Petitioner was denied his right to due process by the Kentucky courts' refusal to accord to him what the due process clause requires: the dismissal of the offense charged where the evidence does not establish an essential element of the offense.

There was substantial prejudice committed in the refusal of the courts below to reduce the offense to fourth degree assault before permitting it to go to the jury. The sentence for the second degree assault of which Petitioner was convicted, five years, was the least possible under the statute. But Petitioner then was subjected to an additional ten year sentence as a persistent felony offender.

The prejudice to Petitioner comes more into focus when all claims raised herein are considered; had the trial court taken second degree assault from the jury, proceeding upon fourth degree assault, and then instructed the jury (as Petitioner requested) upon the mitigating factor of extreme emotional disturbance, then the jury could have convicted Petitioner, if at all, of a misdemeanor. This scenario would not only result in a sentence of no more than 90 days incarceration on the prinicpal offense, but would have eliminated any possibility of Petitioner's receiving an additional sentence as a persistent felony offender, because the principal offense would not have been a felony at all.

CONCLUSION

For the reasons stated, the Court is urged to grant this petition for a Writ of Certiorari, and to reverse the conviction and sentence imposed by the Kentucky courts.

Respectfully submitted,

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APPENDIX A

Opinion Rendered: November 7, 1986; 3:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

85-CA-2611-MR

GLENN JOHNSON,
Appellant,

vs.

COMMONWEALTH OF KENTUCKY,
Appellee.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI
ACTION NO. 84-CI-213

AFFIRMING

Before: CLAYTON, COMBS and DYCHE, Judges.

DYCHE, Judge. Glenn Johnson and another man were involved in an altercation at the V.F.W. hall at Alexandria, Kentucky on October 10, 1984; as a result thereof, Johnson was convicted by a jury of assault, second degree and sentenced by the Campbell Circuit Court to five years. He now appeals, citing three errors. We affirm.

Two of the errors claimed concern the evidence and in-

structions. We will deal with them first. At the conclusion of all of the evidence, Johnson moved the trial court for a directed verdict on the charge of assault, second degree, alleging that the victim's injuries were not "serious" under KRS 500.080(15) and *Luttrell* v. *Commonwealth*, Ky., 554 S.W.2d 75 (1977).

Although no medical testimony was introduced, the victim testified that as a result of the fight with appellant, he had three broken ribs, lost four teeth, and that thirty to thirty five stitches were required to close lacerations on his face. The trial court ruled that the evidence was sufficient to allow the jury to be instructed on both second degree assault (requiring serious physical injury) and fourth degree assault (requiring physical injury).

Examining the evidence herein, we hold that the trial court properly instructed the jury on both degrees of assault, overruling appellant's motion for directed verdict. *Commonwealth* v. *Sawhill*, Ky., 660 S.W.2d 3 (1983).

Johnson also sought an instruction on extreme emotional disturbance (KRS 508.040 and KRS 507.020(1)(a)) and was refused by the trial court. This statute provides not a justification for assaultive behavior, but a mitigation; the standard to be used when deciding whether or not to instruct the jury under the statute is set out in *Creamer* v. *Commonwealth*, Ky. App., 629 S.W.2d 324, 325 (1982): "First, there must be evidence of extreme emotional disturbance, and, second, there must be a reasonable justification or excuse under the circumstances as the accused believes them to be."

The record indicates no extreme emotional disturbance of the appellant. To accept his argument would be tantamount to holding that this instruction would be required in each and every assault case where name-calling was involved; we decline to do so. The trial judge was correct in refusing the instruction.

Appellant's final assertion is that he was denied a fair trial due to statements made during the trial by the prosecutor. We have examined closely the questions and remarks of the prosecutor and find none which would unfairly prejudice the

appellant. This case falls very, very short of the type conduct engaged in by the prosecutor in *Cole* v. *Commonwealth*, Ky. App., 686 S.W.2d 829 (1985).

The judgment of the Campbell Circuit Court is affirmed.

All concur.

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APPENDIX B

SUPREME COURT OF KENTUCKY

87-SC-593-D
(85-CA-2611-MR)

GLENN JOHNSON,

Movant,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

CAMPBELL CIRCUIT COURT
NO. 84-CI-213

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

WINTERSHEIMER, J., not sitting.

Entered September 15, 1987.

/s/ Robert F. Stephens
Chief Justice